84-32

No.

In the Supreme Court of the United States

October Term, 1984

JESSIE R. GOOLSBY,
Petitioner,

vs.

NORFOLK & WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Do regulations of the Federal Railroad Administration issued pursuant to the Railroad Safety Act of 1970, 45 U.S.C. §§ 421 et seq., requiring that track must be supported by material which will provide adequate drainage for the track, apply to the duty of a railroad employer to its employee in an action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq., where the employee was injured while working as a trackman in an area that was muddy, under water and without drainage?

2. If such regulations were relevant to the issue of the railroad's negligence in such an action, were those regulations subject to exclusion under Rule 403 of the Federal Rules of Evidence?

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No.

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To the United States Court of Appeals
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OPINIONS BELOW

Petitioner, Jessie R. Goolsby, prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the opinion (Appendix A1) and judgment (Appendix A14) of that court entered on April 11, 1984, in Case No. 83-1802. That opinion and judgment affirmed the judgment entered in the United States District Court, Middle District of North Carolina, Winston-Salem Division, in Case No. C-80-469-WS entered on a jury verdict in favor of respondent and against petitioner and the order of the District Court overruling petitioner's motion for new trial (Appendix A10), filed contemporaneously with the District Court's Memorandum (Appendix A11).

JURISDICTION OF THE COURT

The judgment of the United States Court of Appeals for the Fourth Circuit of which review is sought was entered on April 11, 1984.

In the action filed and tried herein, petitioner set up claims involving the following statutes of the United States, to-wit, the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. and the Railroad Safety Act of 1970, 45 U.S.C. §§ 421 et seq.

Jurisdiction to review the said judgment of the United States Court of Appeals for the Fourth Circuit by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254, which provides in portions pertinent to this petition:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

STATUTES, REGULATIONS AND RULES

The statutes involved in this petition for review are certain sections of the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq., and certain sections of the Railroad Safety Act of 1970, 45 U.S.C. §§ 421 et seq.

From the former Act the following sections are pertinent to this petition: 45 U.S.C. § 51 (Appendix A15); 45 U.S.C. § 53 (Appendix A16); and 45 U.S.C. § 54 (Appendix A16).

The sections from the Railroad Safety Act of 1970 pertinent to this petition are: 45 U.S.C. § 421 (Appendix A16); 45 U.S.C. § 431(a)(1)(2) (Appendix A17); 45 U.S.C. § 437(c) (Appendix A18); and 45 U.S.C. § 438 (Appendix A18).

The regulations of the Federal Railroad Administration pertinent to this petition are those found in 49 C.F.R. § 213.101 and § 213.103, Subpart D—Track Structure (Appendix A19).

Also pertinent to this petition is Rule 403 of the Federal Rules of Evidence (Appendix A19).

STATEMENT OF THE CASE

This action was filed and tried under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq., in the United States District Court for the Middle District of North Carolina, Winston-Salem Division, No. C-80-469-WS. In his complaint, petitioner, Jessie R. Goolsby, alleged that while he was employed as a section track laborer for the respondent, Norfolk & Western Railway Company, on September 21, 1977, in Winston-Salem, North Carolina, he suffered injuries caused in whole or in part by the negligence of the respondent. Respondent in its answer admitted the jurisdictional allegations invoking the Federal Employers' Liability Act and jurisdiction of the action was thereby conferred upon the District Court under 45 U.S.C. § 56. Respondent further admitted that petitioner injured his back on September 21, 1977, but denied that the respondent was negligent or that any negligence of the respondent caused the petitioner's injuries.

At the trial the evidence established that petitioner and other laborers were directed by respondent's assistant foreman to raise a track in the area of respondent's round-

house in Winston-Salem on September 21, 1977. The area where they were directed to work was a low place and it was raining and had been raining for several days prior to the day that the work was assigned, with the result that the area of about four rail lengths was under water with only the top part of the rails above the water level. The area had not been maintained in years; the rock ballast had been mashed down into the ground; there was no drainage for the water and when it rained the water accumulated and stayed in that area. There was mud that would come up around the ties and in some cases up over the ties. The track area had been in that condition for years. Petitioner and the other laborers were ordered to take hand jacks and jack up the ties and the rails up out of the water and to get rock ballast and tamp the ballast underneath the ties by hand. The jack weighed 60 pounds or more and petitioner and the others were working in water and mud. One thirty-nine foot section of rail weighed sixteen or seventeen hundred pounds, and one railroad tie weighed two to three hundred pounds. When petitioner at first tried to place the jack in the water and mud and to raise the ties and rails, the jack simply sank into the mud and the ties were not raised. He was then ordered to get something underneath the jack to help hold it and he searched around and found a piece of wood to place under the jack, but even after placing the wood under the jack, it still sank down into the mud six or seven inches. Eventually the rails and ties were jacked up to a point where they shoveled and tamped the ballast underneath the ties to support the ties and rail at a higher level. After the rails and ties had been raised by forcing the rock and ballast under the ties, the jack was released, but as petitioner attempted to pull up and remove the jack, it stuck and stopped because of the suction from the mud and he injured his back.

Prior to argument and charge to the jury, petitioner offered exhibit 3 containing certain regulations of the Federal Railroad Administration, pertinent provisions of which are (49 C.F.R. §§ 213.101 and 213.103):

Subpart D—Track Structure

§ 213.101 Scope.

This subpart prescribes minimum requirements for ballast, crossties, track assembly fittings, and the physical condition of rails.

§ 213.103 Ballast; general.

Unless it is otherwise structurally supported, all track must be supported by material which will—

* * * * *

(c) Provide adequate drainage for the track; and

(d) Maintain proper track cross-level, surface, and alinement.

After hearing arguments of counsel, the District Court excluded the regulations on the ground that those regulations do "not describe the duty of the railroad to provide a safe place to work for trackmen," and the Court also excluded the regulations under Rule 403 of the Federal Rules of Evidence (Appendix A7).

The jury found that respondent was not negligent and in accordance with that finding, the District Court entered final judgment for respondent on May 25, 1983 (Appendix A8). Petitioner filed a motion for new trial with memorandum in support, presenting, among others, the following ground: the trial court erred in excluding the proffered regulations of the Federal Railroad Administration. In memorandum opinion and by order dated

August 2, 1983, the trial court overruled petitioner's motion for new trial (Appendix A10, A11).

On appeal to the United States Court of Appeals for the Fourth Circuit, the Court of Appeals by opinion and judgment entered on April 11, 1984, affirmed the judgment and order of the District Court (Appendix A1, A14).

ARGUMENT

A. Question One

The regulations pertinent to the primary issue herein provide (Federal Railroad Administration, Regulations, 49 C.F.R. §§ 213.101, 213.103):

Subpart D—Track Structure

§ 213.101 Scope.

This subpart prescribes minimum requirements for ballast, crossties, track assembly fittings and the physical condition of rails.

§ 213.103 Ballast; general.

Unless it is otherwise structurally supported, all track must be supported by material which will—

* * * * *

(c) Provide adequate drainage for the track; and

(d) Maintain proper track cross-level, surface and alinement.

Those regulations were issued pursuant to authority conferred upon the Secretary of Labor (later transferred to the Federal Railroad Administration) under the Railroad Safety Act of 1970. 45 U.S.C. §§ 421 et seq.

The Court of Appeals for the Fourth Circuit held that the statute and the foregoing regulations adopted were "not applicable to track workmen. Its obvious purpose was to set standards for the safe operation of railroads and not to define a duty owed to trackmen in the performance of their duties as employees of the railroads." (Appendix A2).

The foregoing decision of the United States Court of Appeals for the Fourth Circuit presents three substantial reasons for review by this Court on writ of certiorari, in accordance with this Court's Rule 17.1(c). First of all, an important federal question was presented, namely, whether a federal regulation issued under the authority of the Railroad Safety Act of 1970 requiring all track to be supported by material which will provide adequate drainage for the track applies only for the purpose of assuring safe train operation and not for the safety or protection of railroad employees who are working on and about the tracks. We are aware of no decision deciding the foregoing issue with respect to the specific regulations involved, but the import of the decision of the Court of Appeals transcends that presented by those specific regulations. If the Court of Appeals is correct, it will follow that any duly issued regulation pursuant to the Railroad Safety Acts, if focused on requirements of track and roadbed, will extend protection only for those connected with the operations of trains and will afford no protection for those who are working on or about the track and roadbed. The underlying import of the Court of Appeals' decision, therefore, raises an important question of federal law which should be settled by this Court.

Secondly, the decision of the Court of Appeals has decided the foregoing important federal question in a way

that conflicts with the intent of Congress as expressed in the Railroad Safety Act of 1970, 45 U.S.C. §§ 421 et seq., and the related Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq.

The stated Congressional purpose of the Railroad Safety Act of 1970 is set forth in 45 U.S.C. § 421 which provides:

> The Congress declares that the purpose of this act is *to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce death and injuries to persons* and to reduce damage to property caused by accidents involving any carrier of hazardous materials. (Emphasis supplied.)

Pursuant to that purpose, Congress in the same Act directed the Secretary of Transportation (this function has since been transferred to the Federal Railroad Administration) to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for *all areas of railroad safety* supplementing provisions of law and regulations in effect on October 16, 1970 . . . ." 45 U.S.C. § 431(a) (emphasis supplied).

Another provision of the Railroad Safety Act, as enacted in 1977, imposed a duty on the railroad as set forth in 45 U.S.C. § 438(a):

> (a) *It shall be unlawful* for any railroad *to disobey, disregard, or fail to adhere to any rule, regulation, order, or standard* prescribed by the Secretary under this sub-chapter. (Emphasis supplied.)

The foregoing three provisions compel the conclusion that the purpose of the Act and the regulations issued pursuant thereto is to impose a duty on railroads to pro-

vide safety not only in train operations, but in "all areas" of railroad operations and "all areas of railroad safety." Certainly the petitioner as an employee of the railroad and the work he was performing are included within the foregoing broad concepts and stated purpose of the Act.

The petitioner was a railroad trackman engaged in a railroad operation and the *past* and *ongoing* failure to provide adequate ballast for drainage jeopardized *his* safety as well as that of any crew member of a train passing over that area. The broad statutory purpose underlying the foregoing regulations dictates, therefore, that the regulations be interpreted to protect the safety of petitioner, a track worker, since he was engaged in railroad operations and since his safety in his railroad work area must certainly be included in the broad statutory scope of "all areas of railroad safety." The issue of the violation of the regulations must be, therefore, relevant, and should have been submitted to the jury.

It is clear that Congress intended that the Railroad Safety Act of 1970 be considered *in pari materia* with the Federal Employers' Liability Act.

45 U.S.C. § 437(c) of the Railroad Safety Act of 1970 provides:

> All orders, rules, regulations, standards, and requirements in force, or prescribed or issued by the Secretary under this sub-chapter, or by any state agency which is participating in investigative and surveillance activities pursuant to Section 435 of this Title, shall have the *same force and effect as a statute for purposes of the application of Sections 53 and 54 of this Title, relating to the liability of common carriers by railroad for injuries to their employees.* (Emphasis supplied.)

In accordance with the foregoing provisions of 45 U.S.C. § 437(c), any safety regulation issued pursuant to that Act has "the same force and effect as a statute for purposes of the application of Sections 53 and 54 of this Title, relating to the liability of common carriers by railroad for injuries to their employees."

Sections 53 and 54 of Title 45 referred to in Title 45, § 437(c), quoted *supra*, are sections in the Federal Employers' Liability Act, 45 U.S.C. §§ 53 and 54, and relate to the subjects of contributory negligence (diminution of damages but not a bar to the claim) and assumption of risk (eliminated as a matter of law), respectively.

It follows that in this action under the Federal Employers' Liability Act, the court should have applied the broad purpose and intent of Congress expressed in the Railroad Safety Act of 1970 and should have permitted petitioner to introduce the excluded evidence for jury consideration as a relevant standard of care imposed upon and applied to all railroads in the United States by a federal agency pursuant to authorization by Congress.

The narrow construction of the pertinent regulations by the Court of Appeals was contrary to the foregoing expressed purpose and intent of Congress in those two Federal Acts and this Court should correct that erroneous construction by review on writ of certiorari.

Thirdly, the decision of the Court of Appeals is in conflict with applicable decisions of this Court and other courts of appeals in cases involving an analogous issue with respect to other railroad safety acts.

We refer to the Safety Appliances Act, 45 U.S.C. §§ 1 et seq., concerning railroad cars, and the Boiler Inspection Act, 45 U.S.C. §§ 22 et seq., concerning railroad locomotives.

In the case of *Brady v. Terminal Railroad Association*, 303 U.S. 10, 16 (1938), the plaintiff was a car inspector employed by the defendant railroad and was hurt while inspecting a railroad car for defects when a grabiron on the car became loose and he fell. The defective grabiron was a violation of the Safety Appliances Act. The court held that ". . . one is not to be denied the benefit of the Act because his work was that of inspection for the purpose of discovering defects." *Id.* at 16.

The Supreme Court further stated and held:

> The fact that petitioner was looking for defects does not prevent recovery as the statute excludes the defense of assumption of risk. 45 U.S.C.A. 7, 54.

Id. at 16.

By analogy: (1) petitioner, a track worker, should not be denied the protection of the regulations issued pursuant to the Railroad Safety Act of 1970 because the purpose of his work was to attempt to correct a violation of those regulations; and (2) the fact that petitioner was directed to and did undertake work to attempt to correct a condition in violation of the regulations does not prevent recovery or application of the regulations since the Railroad Safety Act incorporates the same provisions of the Federal Employers' Liability Act referred to in *Brady*, namely, 45 U.S.C. § 54, which excludes the defense of assumption of risk.

The foregoing interpretation of the Safety Appliances Act is long-entrenched. The early decision in *Chicago Junction Ry. Co. v. King*, 169 F. 372 (7th Cir. 1909), applies that interpretation to facts analogous to those in the instant case. The Court of Appeals held as stated in paragraph 2 of the syllabus:

> The protection given to railroad employes by the safety appliance act (Act March 2, 1893, c. 196, § 2, 27

Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring cars to be equipped with automatic couplers, is not limited to employes injured while coupling or uncoupling cars, but extends to a switchman who was injured as a direct result of the movement of a train containing a car with a broken coupler while, acting within the scope of his duty, he was between the cars *engaged in replacing the broken part,* and he cannot be charged with contributory negligence because of his so going between the cars with knowledge of the defect. (Emphasis supplied.)

The same interpretation has been applied to the Safety Act concerning railroad locomotives, the Boiler Inspection Act, 45 U.S.C. §§ 22 et seq. In the case of *Holfester v. The Long Island Railroad Co.,* 360 F.2d 269, 373 (2nd Cir. 1966), the Court of Appeals stated and held:

> Appellant also argues that Congress could not have intended the Boiler Inspection Act, with its absolute liability, to apply to one in Holfester's position who, as an inspector, was actually engaged in searching out defects in order that the Railroad could comply with the Act. This question was also raised in Brady v. Terminal R. R. Assn., supra, and was disposed of at page 16 of 303 U.S., page 429 of 58 S.Ct. as follows:
>
> > "We think that these considerations require the conclusion that one is not to be denied the benefit of the act because his work was that of inspection for the purpose of discovering defects. As we said in Louisville & Nashville R. Co. v. Layton, [243 U.S. 617, 37 S.Ct. 456, 61 L.Ed. 931], supra, the liability 'springs from its being made unlawful to use cars not equipped as required,

> —not from the position the employee may be in, or the work which he may be doing at the moment when he is injured,' provided the defective equipment is the proximate cause of the injury.
>
> The fact that petitioner was looking for defects of the sort which caused his injury does not prevent recovery as the statute expressly excludes the defense of assumption of risk . . . ."
>
> These considerations are equally applicable to the Boiler Inspection Act, and Holfester is not, for the reason advanced, barred from seeking relief under its provisions.

Id. at 373.

Petitioner did not claim at the trial that a violation of the regulations involved in this case is a violation of an absolute duty on the part of the respondent; however, the principle with respect to the *scope* of coverage and protection is the same. The interpretation of the scope of protection of regulations pursuant to the Railroad Safety Act of 1970 should harmonize with the scope of protection afforded by the foregoing decisions applying the other Safety Acts and should, therefore, include any employee who is injured in whole or in part as a result of such violation, even though the employee is inspecting for or engaged in repairing or correcting such violation.

The decision of the Court of Appeals should be reviewed by this Court on writ of certiorari so that the decision may be corrected to effect a harmonious application of the regulations pursuant to the Railroad Safety Act of 1970 with the application of the other railroad safety acts as held by this Court and other circuit courts of appeals.

B. Question Two

The Court of Appeals upheld the District Court's exclusion of the proffered regulations on the authority of Rule 403 of the Federal Rules of Evidence which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This holding of the Court of Appeals misconstrues the authority granted to the Court under Rule 403. If the pertinent regulations applied to a track worker such as petitioner, those regulations by federal statutes acquire the force of *law*. 45 U.S.C. § 437(c); 45 U.S.C. § 438(a). This is not to say that those regulations imposed an absolute duty on respondent, but the statutes are clear that such regulations do acquire the force of law and therefore prescribe a lawful federal standard applying to all railroads. Having acquired by statute such character, those regulations, if applicable, are not subject to exclusion under Rule 403.

The trial court, of course, had authority and obligation to instruct the jury as to the *legal effect* of such regulations on the duty of respondent, but Rule 403, a rule of *evidence,* should not be construed to give the court discretion to exclude *completely* such federal standards which by statute have the force of *law*.

The foregoing interpretation of a federal rule of evidence by the Court of Appeals which would authorize the trial court to exclude completely a standard set by

law was a serious misinterpretation involving an important federal matter which this Court should correct by review on writ of certiorari.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-1802

Decided April 11, 1984

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JESSIE R. GOOLSBY,
Appellant,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, Winston-Salem Division. FRANK W. BULLOCK, JR., *District Judge* (C/A 80-469)

Before MURNAGHAN and CHAPMAN, *Circuit Judges* and KNAPP, *Senior District Judge* for the Southern District of West Virginia, sitting by designation

[2] PER CURIAM:

Jessie R. Goolsby, plaintiff below, appeals from a judgment for the defendant entered upon a jury verdict in an action based upon negligence under the Federal Employees Liability Act (FELA), citing as error (1) the refusal of the trial court to admit into evidence Regulations of the Federal Railroad Administration promulgated pursuant to the Federal Railroad Safety Act of 1970, per-

taining to track safety,[1] (2) the admission of opinion evidence of a co-worker that the site of the injury was not unsafe, and (3) that the verdict of the jury was against the weight of the evidence. We find no error and affirm.

[3] On the first issue we agree with the district court that the statute in question and the regulations adopted thereunder were not applicable to track workmen. Its obvious purpose was to set standards for the safe operation of railroads and not to define a duty owed to trackmen in the performance of their duties as employees of railroads. To admit in evidence the statute and the regulations adopted thereunder would have had the practical effect of imposing strict liability as the duty owed by a railroad employer to its employees in case of injury at work. Certainly in view of the liberal provisions of FELA, Congress intended no such application of the Act in question.

Assuming arguendo that the regulations were admissible on the issue of negligence charged to defendants, it is clear from the evidence that the tracks at the site of

---

1. Regulations promulgated pursuant to 45 U.S.C. § 421, et seq., provide in part under Subpart D—Track Structure, as follows (Title 49 C.F.R., Sections 213.101, 213.103):

Subpart D—Track Structure

§213.101 Scope.

This subpart prescribes minimum requirements for ballast, crossties, track assembly fittings, and the physical condition of rails.

§213.103 Ballast; general.

Unless it is otherwise structurally supported, all track must be supported by material which will—

* * * * *

(c) Provide adequate drainage for the track; and

(d) Maintain proper track cross-level, surface and alinement.

the accident were in a poor state of repair. In the opinion of the trial court, to permit the admission of a copy of the statute and the regulations thereunder on the issue of negligence would, in any event, be merely cumulative, be susceptible of undue prejudice and impose on defendant an unfair burden in meeting this sort of proof. Accordingly, plaintiff's proffer was denied by the district judge in reliance upon Rule 403 of the Federal Rules of Evidence.[2] In view of the uncontroverted [4] evidence introduced by Appellant as to the deteriorated condition of the roadbed and the state of disrepair existing at the work site at the time the regulations were offered in evidence, we hold that the district court's action was not clearly erroneous.

On the second issue raised by defendant in this appeal, we perceive no error in allowing a co-worker, called by plaintiff, to give his opinion on cross-examination by defendant as to any dangers to workmen at the time and place in question. Rules 701 and 704 of the Federal Rules of Evidence clearly allow lay witnesses to give opinion testimony even on the ultimate issue of fact to be decided.[3]

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2. Rule 403, Federal Rules of Evidence.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

3. Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony of the determination of a fact in issue.

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The trial court acted within the bounds of discretion in permitting such testimony and we cannot say he was in error.

As to the third issue raised by plaintiff, we conclude from the record that the issues of negligence and proximate cause were properly submitted to the jury. Whether the injury to plaintiff was proximately caused by negligence on the part of the defendant railroad was for the jury, and we cannot say the jury verdict was contrary to the evidence. See, *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980).

For the foregoing reasons we affirm.

RULING OF THE UNITED STATES DISTRICT COURT ON FRA REGULATIONS

(May 12, 1983)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION
C-80-469- WS

JESSIE R. GOOLSBY,
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY,
Defendant.

The above-styled case was resumed in the United States Courtroom, Federal Building, Winston-Salem, North Carolina, at 9:30 A.M., Thursday, the 12th day of May 1983.

THE HONORABLE FRANK W. BULLOCK, JR., PRESIDING

JURY TRIAL

* * * * *

[187] The Court: Before the jury comes back in, let me hear from you on the issue you were talking about just before we took a recess—that is, Mr. Slane, your tentative offer of Plaintiff's Exhibit 3, please, and I believe Mr. Ross has objected to that.

Mr. Slane: Actually, Your Honor, I believe it's 4. I'm going to have two hospital records. All I'm asking is to introduce this as a standard of care, as a duly promul-

gated regulation by the Federal Government. It's applicable to the N&W. I'm not going to argue that it's a violation of negligence per se. It's simply a standard of care for them to consider along with the N&W rules, and I think that the Court should take judicial notice. It's a duly promulgated—

The Court: Does it provide a standard of care for trackmen in the past?

Mr. Slane: It provides a standard of care for the railroad.

The Court: Does it describe the standard of care or the duty the railroad owes to—this is a standard of care. It's a description of track structure as I read it and how a track is supposed to be constructed. If it was a [188] regulation providing the standard of care that the railroad owed to employees working on the track, I would agree with you completely, but I have a real question whether this provides the standard of care which is applicable in this case.

Mr. Slane: Well, I think the care, Your Honor, is that you either keep your tracks that way or you don't operate your trains.

The Court: And if the Plaintiff in this case had perhaps been injured by the operation of a train, that would seem to be appropriate, but under this standard of care, how would a trackman ever do any repairs? You could never repair a track if this was the standard of care—

Mr. Slane: Now, all I want to be able to show is that the standard says that you have to have ballast and the ballast has got to be in such condition that it affords drainage, and if you don't have that—

The Court: But isn't the purpose of that to provide drainage for the safe operation of the track of the railroad trains and cars, not to provide a safe place for workers working on the track?

Mr. Slane: Yes, I think that's true. I think that Tom would be allowed to argue that, Your Honor. The precautionary instruction can be given to that effect, that it's applicable as you said, but still is a standard of care that they violated, and if they hadn't violated that standard of **[189]** care, we wouldn't have had the accident.

The Court: Well, if they didn't violate that standard of care, you said they violated, they'd never need any track repairs.

Mr. Slane: No, Your Honor. I think if they had some ballast there—you still have low spots even with some ballast, but when you have no ballast and no drainage, I think it's indicative of the problem that has been ongoing in that area for years and years and years.

The Court: Well, I am going to find it has not provided the standard of care for a train during repairs and not the regulation offered, does not describe the duty of the railroad to provide a safe place to work for trackmen, and I'm also going to exclude it under Rule 403. You can, of course, have an exception to that.

* * * * *

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed May 25, 1983)

No. C-80-469-WS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

JESSIE R. GOOLSBY,
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY CO.,
Defendant.

JUDGMENT

This cause came on for trial before the Court and a jury on May 11, 1983, and continued through May 12, 1983.

The following issues were duly tried, submitted to and answered by the jury, as follows:

ISSUES

1. Do you find from a preponderance of the evidence that the Defendant Norfolk and Western Railway Company was negligent in the manner claimed by the Plaintiff, Mr. Goolsby, and that such negligence was a legal cause of damage to the Plaintiff?

ANSWER YES OR NO NO

2. If you answered "Yes" to Question One, do you find from a preponderance of the evidence that the Plaintiff himself was negligent in the manner claimed by the Defendant and that such negligence was a legal cause of Plaintiff's own damage?

ANSWER YES OR NO .....

3. If you answered "Yes" to Question Two, what proportion or percentage of Plaintiff's damage do you find from a preponderance of the evidence to have been legally caused by the negligence of the respective parties?

ANSWER IN TERMS OF PERCENTAGES

The Defendant .....%

The Plaintiff .....%

(Note: The total of the percentages given in your answer should equal 100%)

4. If you answered "Yes" to Question One, what sum of money do you find from a preponderance of the evidence to be the total amount of Plaintiff's damages (without adjustment by application of any percentages you may have given in answer to Question Three)?

ANSWER IN DOLLARS $.....

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the plaintiff have and recover nothing on his claims against the defendant and that this action be, and the same hereby is, DISMISSED.

/s/ FRANK W. BULLOCK, JR.
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT OVERRULING MOTION FOR A NEW TRIAL

(Filed August 2, 1983)

Civil No. C-80-469-WS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

JESSIE R. GOOLSBY,
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY CO.,
Defendant.

ORDER

Pursuant to a memorandum opinion filed contemporaneously herewith, the motion of the Plaintiff, Jessie R. Goolsby, for a new trial pursuant to Rule 59(a), Fed. R. Civ. P., is DENIED.

/s/ FRANK W. BULLOCK, JR.
United States District Judge

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT

(Filed August 2, 1983)

Civil No. C-80-469-WS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

JESSIE R. GOOLSBY,
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY CO.,
Defendant.

MEMORANDUM OPINION

BULLOCK, *District Judge*

This matter is currently before the court on the motion of the Plaintiff, Jessie R. Goolsby, for a new trial pursuant to Rule 59(a), Fed. R. Civ. P. For the reasons discussed below, the court will deny Plaintiff's motion.

The Plaintiff has been and is employed by the Defendant, Norfolk & Western Railway Co., as a section laborer. On September 21, 1977, while performing his duties as a section laborer, Goolsby injured his back while removing jacks that had been stuck in mud underneath the rails of a train track. In his complaint, Goolsby alleged that his injury was caused by the Defendant's negligent failure to provide him with a reasonably safe place to work in violation of the Federal Employers Liability Act, 45 U.S.C. § 51.

[2] This action came on for trial before the court and a jury, and on May 12, 1983, the jury rendered a verdict in favor of the Defendant. Plaintiff raises three grounds for a new trial which the court will deal with in order.

The Plaintiff first contends that the jury's verdict in favor of the Defendant was contrary to the weight of the evidence. Under Rule 59, Fed. R. Civ. P., a district court may weigh the evidence and consider the credibility of witnesses. The verdict must be set aside and a new trial ordered, even if the verdict is supported by substantial evidence, where a trial judge "is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice . . . ." *Williams v. Nichols*, 266 F.2d 389, 392 (4th Cir. 1959), *citing, Aetna Casualty & Surety Company v. Yeatts*, 122 F.2d 350 (4th Cir. 1941). *Also see Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 892 (4th Cir. 1980). The verdict in this case was neither against the clear weight of the evidence nor was it based upon false or misleading evidence. Therefore, upholding the verdict rendered by the jury in this case will not work a miscarriage of justice.

Plaintiff next argues that a new trial is warranted due to the court's error in excluding two regulations issued by the Federal Railroad Administration, 49 C.F.R. §§ 213.101 and 213.103. Plaintiff requested that these regulations be read into evidence at the close of his case. Upon objection by the Defendant, the court excluded the regulations as evidence based upon the court's conclusion that the regulations were of little, if any, relevance **[3]** to the question of the duty of care owed to the Plaintiff by the Defendant. The court also concluded that introduction of the regulations in the manner requested by the Plaintiff should be prohibited under Rule 403, Fed.

R. Evid. The court believes that those rulings were correct when made and reaffirms them herein.

As a final grounds for a new trial, Plaintiff argues that the court committed an error when it permitted witness Rufus Watkins to testify as to his opinion concerning whether or not the work place provided by the Defendant to the Plaintiff on September 21, 1977, was safe. Watkins was called to testify by the Plaintiff. At the time of the Plaintiff's injury, Watkins was employed by the Defendant as a member of the same work crew to which the Plaintiff was assigned. Watkins personally observed the working conditions provided by the Defendant to the Plaintiff on the day of Plaintiff's injury. On direct examination by the Plaintiff, Watkins was asked to describe those working conditions to the jury.

On cross-examination, Watkins was asked by the Defendant to give his opinion regarding whether or not the working conditions provided by the Defendant to the Plaintiff on the day of Plaintiff's injury were safe. Watkins' opinion was rationally based upon his own perception and could have been helpful to the jury in understanding his testimony, particularly since Watkins had been asked by the Plaintiff to describe the working conditions. Fed. R. Evid. 701. Testimony in the form of opinion is not objectionable because it embraces an ultimate issue to be decided by the jury. Rule 704, Fed. R. Evid. The court, therefore, does not believe **[4]** it committed error in allowing Watkins to give his opinion that the conditions provided by the Defendant were safe.

Accordingly, for the reasons discussed above, an order will be entered denying Plaintiff's motion for a new trial pursuant to Rule 59(a), Fed. R. Civ. P.

/s/ FRANK W. BULLOCK, JR.
United States District Judge

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

(Filed April 11, 1984)

No. 83-1802

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JESSIE R. GOOLSBY,
Appellant,

vs.

NORFOLK & WESTERN RAILWAY COMPANY,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Middle District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ WILLIAM K. SLATE II
Clerk

UNITED STATES CODE

45 § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 § 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 § 421. Congressional declaration of purpose

The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations

and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

45 § 431. Promulgation of rules, regulations, orders, and standards—Authority of Secretary; collective bargaining agreements under Railway Labor Act as consistent with rules, etc.

(a) The Secretary of Transportation (hereafter in this subchapter referred to as the "Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety. However, nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act, including agreements relating to qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the Secretary under this subchapter. Nothing in this subchapter shall be construed to give the Secretary authority to issue rules, regulations, orders, and standards relating to qualifications of employees, except such qualifications as are specifically related to safety.

* * * * *

45 § 437. General powers

* * * * *

(c) Force effect of orders, rules, regulations, standards, and requirements for purposes of determining liability of common carriers by railroad for injuries to employees

All orders, rules, regulations, standards, and requirements in force, or prescribed or issued by the Secretary under this subchapter, or by any State agency which is participating in investigative and surveillance activities pursuant to section 435 of this title, shall have the same force and effect as a statute for purposes of the application of sections 53 and 54 of this title, relating to the liability of common carriers by railroad for injuries to their employees.

* * * * *

45 § 438.

(a) It shall be unlawful for any railroad to disobey, disregard, or fail to adhere to any rule, regulation, order, or standard prescribed by the Secretary under this subchapter.*

*Amended Publ. L. 97-468, Title VII, § 706, Jan. 14, 1983, 96 Stat. 2581, to provide as follows:

(a) Unlawful acts

It shall be unlawful for any railroad to fail to comply with any rule, regulation, order, or standard prescribed by the Secretary under this subchapter.

FEDERAL RAILROAD ADMINISTRATION REGULATIONS

Subpart D—Track Structure

49 C.F.R. § 213.101 Scope.

This subpart prescribes minimum requirements for ballast, crossties, track assembly fittings, and the physical condition of rails.

49 C.F.R. § 213.103 Ballast; general.

Unless it is otherwise structurally supported, all track must be supported by material which will—

(a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;

(b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;

(c) Provide adequate drainage for the track; and

(d) Maintain proper track cross-level, surface, and alinement.

FEDERAL RULES OF EVIDENCE

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

No. 84-32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JESSIE R. GOOLSBY,

Petitioner,

v.

NORFOLK & WESTERN RAILWAY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the trial court commit reversible error in refusing to admit into evidence the Federal Railroad Administration's regulations concerning track structure, 49 C.F.R. §§ 213.101 and 213.103, in the absence of sponsoring testimony and without any foundation for admission?

PARTIES INVOLVED

The respondent Norfolk & Western Railway Company (hereafter NW) is a Virginia Corporation. On September 6, 1983, counsel for NW certified to the United States Court of Appeals for the Fourth Circuit that NW is a subsidiary of the Norfolk Southern Corporation and that no publicly-owned corporation, not a party to the case, had a financial interest in the outcome.

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IN THE

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Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

NW generally agrees with petitioner Goolsby's (hereafter Goolsby) statement of the case. However, it should be noted that there was some evidence that Goolsby violated a railroad safety rule in the way he lifted the jack, that he knew NW had rules on safety, particularly on how to lift heavy objects, and that Goolsby knew the jack had sunk in the mud. There was also some evidence that Goolsby told the operating physician that he had jerked the jack.

ARGUMENT

The Complaint initiating this case contained allegations of negligence under the Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.* (hereinafter FELA). The plead-

ings did not refer to either the Railroad Safety Act of 1970, as amended, 45 U.S.C. §§ 421 *et seq.* or Title 49, Chapter II of the Code of Federal Regulations, 49 C.F.R. §§ 200.1 *et seq.*

The case was tried under FELA. The regulations in question, 49 C.F.R. §§ 213.101 & §§ 213.103, became an issue only when Goolsby proffered them at the conclusion of his evidence without testimony or foundation and NW objected to their admission. Judge Bullock sustained NW's objection and submitted the case to the jury after proper instructions under FELA.

Judge Bullock was correct in his ruling for two reasons. First, 49 C.F.R. §§ 213.101 & 213.103 are irrelevant to the duty owed by a railroad to a maintenance of way employee. Second, even if relevant, the regulations were merely cumulative and were properly excluded under Rule 403, Federal Rules of Evidence, because of a clear danger of unfair prejudice, confusion of the issues, and misleading of the jury as well as undue delay and waste of time.

Even if this Court accepts Goolsby's argument that the regulations acquire the force of law, relevancy and applicability must still be demonstrated. This case is no different than an ordinary negligence lawsuit arising from an automobile accident where a defendant driver is driving without a license. Driving without a license is unlawful but irrelevant unless the plaintiff can establish that driving without a license caused or contributed to the injuries. If plaintiff cannot do that, the violation of law is irrelevant to the case and thus inadmissible. *See*, Annot., 29 A.L.R. 2d 963 (1953 & Supp.).

Coming at the end of all the evidence (NW presented no evidence), admission of the proffered regulations would

have served no purpose other than as cumulative evidence to that already presented. Further, Goolsby's proffer of the regulations did not contain any reference to their applicability to the facts of the case or to reasons for their introduction. At that point, there was no evidence that the regulations even covered the area where Goolsby was working. Had they been admitted, no witnesses would have been available for cross-examination. Explanation of their relevance and applicabillty would have been delegated either to counsel in closing arguments or the Court in its instructions, all without a proper foundation ever having been laid for admission. Under those circumstances, their probative value would have been suspect; either it would have been slight or, improperly highlighted, it could have been unfair and extremely prejudicial to NW. Improperly highlighting the regulations, without any foundation or explanation of relevance and applicability, would have impermissibly elevated, in the jury's mind, the standard of care owed by NW to either a standard of strict liability or that violation of the regulations constituted negligence *per se*. Neither standard is a correct application of law under FELA on the facts of this case.

It is important to reiterate that this case was submitted to a jury for determination and that NW offered no evidence. This is not a case where the trial judge directed a verdict for the railroad or set aside the jury's verdict in favor of a plaintiff. As acknowledged by this Court in *Rogers* v. *Missouri Pacific RR.*, 352 U.S. 500, 509, 1 L.Ed.2d 493, 501, 77 S. Ct. 443, ____ (1957),

> cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determina-

> tion . . . The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination.

In this case Goolsby was allowed a jury determination. It happened to be adverse to his interest. On this point, Justice Frankfurter's dissent in *Rogers* is even more persuasive today than in 1957, particularly his repetition of his dissent in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 64, 66, 93 L.Ed. 497, 505, 506, 69 S. Ct. 413, ____, (1949):

> Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. The division in this Court would seem to demonstrate beyond peradventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances. For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in the fallible application of an archaic system of compensation for injuries to railroad employees may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give the power to control the Court's docket. Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough.

Goolsby misapprehends the construction of FELA vis-a-vis the Railroad Safety Act and regulations promulgated thereunder. The scope of Part 213, Track Safety Standards, 49 C.F.R. § 213.1 *et seq.* is "to provide for safe operations over that track." 49 C.F.R. § 213.1. Therefore, the entire Part is irrelevant to the issue of what duty a railroad owes to a maintenance of way employee. Had Congress intended otherwise, it would have been a simple matter to amend any of the various railroad safety acts to insure that a failure to maintain track structure subjected the railroad to strict liability in the event of an employee injury.

The statement in the Railroad Safety Act, 45 U.S.C. § 437(c), that regulations shall have the same force and effect as a statute for purposes of the application of §§ 53 and 54 of this title does not elevate the Act to a standard of absolute liability, as implied by Goolsby. Goolsby's attempt to prove negligence by NW through the general language of the Railroad Safety Act, without any effort to establish relevancy or applicability to the facts of this case is merely an effort to obtain a second appellate review of an adverse trial decision, a review well outside the customary scope of reveiw granted by this Court in the exercise of its certiorari jurisdiction.

Goolsby's reliance, by analogy, on *Brady* v. *Terminal RR Association*, 303 U.S. 10, 82 L.Ed. 614, 58 S.Ct. 426 (1938); *Chicago Junction Ry.* v. *King*, 169 F. 372 (7th Cir. 1909); and *Holfester* v. *Long Island RR*, 360 F.2d 269 (2d Cir. 1966) is misplaced. *Brady* and *King* were decided under the Safety Appliance Act, 45 U.S.C. §§ 1 *et seq.*, and *Holfester* was decided under the Boiler Inspection Act, 45 U.S.C. §§ 22 *et seq.* Both Acts impose absolute liability if the defective equipment is the proximate cause of the injury. This standard of care is sufficient to distin-

guish those three cases from the case at bar. The ultimate thrust of the absolute liability imposed by these Acts requires a jury finding that the equipment was defective and a proximate cause of the injury. The instant case was submitted to the jury on FELA instructions concerning the railroad's duty to its employees to furnish them a safe place to work and suitable equipment with which to work in addition to the trial court's charge that railroad negligence of even the slightest degree is sufficient to impose liability. The jury's verdict is persuasive evidence that Goolsby's injuries were due to his sole negligence.

A railroad is not under a duty to be perfect. For this Court to grant certiorari, and possibly reverse the jury verdict in this case, will amount practically to a condemnation of jury trials in FELA cases or make the railroad an insurer of the safety of employees.

CONCLUSION

For the reasons listed herein, NW respectfully requests this Court to deny certiorari and dismiss the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned hereby certifies that the pleading or paper to which this certificate is affixed was served upon C. Richard Grieser, Counsel of Record, Grieser, Schafer, Blumenstiel & Slane Co., L.P.A., 261 West Johnstown Road, Columbus, Ohio 43230, by depositing a copy of the same, enclosed in a first class, postpaid wrapper properly addressed and placed in a post office or official depository under the care and custody of the United States Postal Service, on this ____ day of August, 1984.

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